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No. 01-1245

Supreme Court, U.S.
FILED

MAY 24 2002

CLERK

In The

SUPREME COURT OF THE UNITED STATES

GREG RUTHERFORD, Butte County
Sheriff's Deputy, MICK GREY, Butte County Sheriff,
and COUNTY OF BUTTE,
Petitioners,
vs.

RICHARD LEO DEORLE
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY OF PETITIONERS

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6 pgs

In the Response to Petition for Writ of Certiorari, Respondent refers to a number of facts which are not relevant to the determination of whether the use of non-lethal force was reasonable in this case. Respondent's recitation to the factual record is based on the incorrect assumption that the shooting of the beanbag round by Deputy Rutherford was deadly force. In this case, although the standard of review requires the facts be taken in the light most favorable to the Respondent, the use of non-lethal force in the shooting of a beanbag round by Deputy Rutherford is reviewed based upon the facts and circumstances known to that peace officer, including reasonably trustworthy information provided to him. Petitioners respectfully submit that the Petition accurately reflects all of the undisputed evidence of what was known by Deputy Rutherford leading up to and including his decision to shoot a beanbag round at Respondent to allow for this Court to properly determine whether this Petition should be granted. Petitioners hereby respond to the points raised in Respondent's Response to the Petition for Writ of Certiorari.

Respondent asserts that the shooting of the beanbag round in this case was a use of deadly force. However, the majority panel of the Ninth Circuit found that the use of the beanbag round was not deadly force. Significantly, Respondent does not dispute that the law regarding whether the shooting of a beanbag round at a suspect constituted non-deadly or deadly force was not clearly established at the time of the subject incident in September, 1996. See, e.g., Omdahl v. Lindholm, 170 F.3d 730 (7th Cir. 1999). The lack of any clearly established law in this area was pointed out in the recent case of Bell v. Irwin, 2002 U.S. Dist. LEXIS 7967 (S.D. Ill. May 2, 2002). In Bell, the district court noted that the only case from a Court of Appeal regarding the use of beanbag rounds against an individual was Omdahl and that "no reasonable officer would take the Omdahl decision to mean anything definitive about when beanbag rounds, whether deadly or not, are appropriate." Id. at *23. Thus, Respondent incorrectly asserts that the use of a beanbag round is deadly force and fails to cite to any specific case law which would support such a theory. Moreover, the existing case law clearly supports the application of qualified immunity in favor of Deputy Rutherford since the law regarding the use of beanbag rounds was not clearly established in September, 1996.

In addition, Respondent does not contest that the opinion by Judge Reinhardt adopted an incorrect legal standard in applying the narrow exception to the requirement that a factually analogous case must exist in order to find that the law is clearly established to overcome qualified immunity. Clearly, that narrow exception is limited to cases in which the conduct of a state actor is so egregious that it would be a patently obvious violation of a constitutional right. See, e.g., United States v. Lanier, 520 U.S. 259, 271, 117 S.Ct. 1219, 1227-1228 (1997). Respondent also fails to dispute that there is a conflict of law between the Circuit Courts of Appeal regarding the legal standard to be applied with respect to that narrow exception. See Morrell v. Mock, 270 F.3d 1090, 1100-1101 (7th Cir. 2001); Vaughn v. Cox, 264 F.3d 1027, 1036 (11th Cir. 2001); Willingham v. Loughman, 261 F.3d 1178, 1188 n.14 (11th Cir. 2001); Preister v. City of Riviera Beach, 208 F.3d 919, 926-27 (11th Cir. 2000); Castell v. Pieschek, 3 F.3d 1050, 1053 (7th Cir. 1993). Rather, Respondent merely quotes from a large portion of the Ninth Circuit opinion such that it must have properly analyzed Saucier.[1] In fact, that quote reinforces the conclusory application of the narrow exception by the Ninth Circuit while conceding that it found there was no closely analogous case law.

Respondent also submits the failure to give a warning to Deorle prior to the deployment of the beanbag round was properly analyzed by the Ninth Circuit Court of Appeal because the giving of a warning is not a new or novel idea. The majority opinion did not cite to any case which held that a warning was required before the use of non-lethal force prior to September, 1996. App. at p. 16 citing Brewer v. City of Napa, 210 F.3d 1093 (9th Cir. 2000). The only other case involving non-lethal force relied upon by Respondent, Vathekan v. Prince George's County, 154 F.3d 173 (4th Cir. 1998), was also decided after the incident in this case. Moreover, those cases dealt with the release of a police dog to seize a suspect who is not in the immediate presence of the officer. Thus, those cases are not factually analogous, nor do they hold that a warning is required prior to the use of non-lethal force, such as the use of the beanbag

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[1] Respondent quoted from the First Amended Opinion of the Ninth Circuit which was later altered with new citations in the Second Amended Opinion. Compare Response to Petition at pp.9-10 with App. at 19-20.

round in this case. Therefore, the law regarding whether a warning is required with respect to the use of non-lethal force, and in particular the use of a beanbag round, was not clearly established in September, 1996. The only other cases relied upon by Respondent involve the use of deadly force which, as indicated above, do not apply to this case.

Respondent has not made any attempt to reconcile the new legal standards to be used in analyzing a use of excessive force case under the Fourth Amendment adopted in this case with the requirement that the law be clearly established in order to overcome qualified immunity. The majority opinion by the Ninth Circuit in this case adopts new factors to be considered and legal standards to be used in analyzing a claim for use of excessive force under the Fourth Amendment. Those factors and standards include (1) that there be a strong governmental interest if the force used may lead to serious injury; (2) that the court may look to the injury sustained to support an inference of excessive force[2]; (3) that the peace officer should have considered alternative types of force; and (4) that a peace officer should consider a mentally ill individual less dangerous. First, there is no case law which addresses those factors and standards prior to September, 1996. Rather, these standards were evolving, if at all, based on case law rendered in 2000. See Headwaters v. County of Humboldt ("Headwaters I") 240 F.3d 1185 (9th Cir. 2000). Moreover, these type of factors require an after-the-fact or hindsight analysis which was rejected by this Court in Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865 (1989). Furthermore, while the Court of Appeal may have found it necessary to set forth these principles to support a basis for a subsequent holding that a right is clearly established in accordance with this Court's directive in Saucier, certainly the law cannot be considered to be clearly established regarding the conduct of Deputy Rutherford in this case.

Petitioners respectfully submit that the majority opinion of the Ninth Circuit in this case has created a conflict amongst the

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[2] See also Santos v. Gates, 287 F.3d 846, *17-*21 (9th Cir. 2002) (petition for rehearing and rehearing en banc pending) (serious injury is evidence of excessive force). Santos, at *36-37 (Tallman, J. dissenting, criticizing reliance by majority on injury to support finding of excessive force).

Circuits regarding the application of the narrow "patently obvious" exception to the requirement that there be factually analogous case law to overcome qualified immunity. The majority opinion in this case will enable courts to circumvent the holding of Saucier by deeming any use of force a patently obvious violation of the Fourth Amendment. This case involved the use of new technology which has not been analyzed in any reported case. This alternative non-lethal weapon was used for the protection of the officer and others against an oncoming, intoxicated, threatening, armed and dangerous individual. The majority opinion concedes that there was no factually analogous case law and contrary to this Court's holding in Saucier refused to grant qualified immunity to Deputy Rutherford. Without the review of this Court, the denial of qualified immunity to Deputy Rutherford will have unfortunate result of deterring the evolution of safer police tactics.

Petitioners have established important reasons why review is warranted in this case. The undisputed evidence establishes that Deputy Rutherford did not violate the constitutional right of Deorle to be free from excessive force and review is appropriate to reestablish the Graham analysis without the inclusion of new or additional factors. Review is warranted to clarify the application of the narrow exception to qualified immunity which is reserved for patently obvious violations which require no factually analogous case law in order to determine that the law was clearly established. Review is also necessary to resolve the conflict between the Ninth Circuit and this Court's opinion in Saucier as well as the opinions of other Circuit Courts of Appeal regarding the legal standard used to determine when the narrow "patently obvious" exception should apply in the context of whether the law is clearly established. Lastly, review is appropriate to clarify the application of qualified immunity in this case where the Court of Appeal adopts new factors and legal standards to be considered in analyzing a claim for use of excessive force under the Fourth Amendment and at the same time determines that law at the time of this incident was clearly established so as to deprive a peace officer of qualified immunity.

Wherefore, Petitioners respectfully request that this Petition for a Writ of Certiorari be granted.

Dated: May 23, 2002

Respectfully submitted,

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